IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73 - 6033

SHARON ROE AND DOROTHY POE, on behalf of themselves and others similarly situated,

APPELLANTS,

v.

NICHOLAS NORTON, individually, as Commissioner of Welfare of the State of Connecticut, and on behalf of others similarly situated,

APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF OF CHILDREN OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement 1

Argument 2

I. No Unsettled Question of State Law Makes Abstention Appropriate 2

II. The Principles Enunciated in Younger v. Harris Do Not Make Dismissal of This Action Appropriate 8

A. The State Characterizes its Proceedings as Civil 8

B. The Children Were Not Parties To The State Court Enforcement Proceedings At The Time This Case Was Filed and Heard Below 11

C. The State Court Proceeding Is Inadequate To Protect The Children From Serious, Irreperable Injury ... 18

1. The State Proceeding Itself Operates To Inflict Irreparable Injury on the Children .. 18

2. The State Court Proceeding Does Not Provide an Adequate Opportunity to Raise and Have Timely Decided the Federal Issues Involved .. 20

D. No Younger Claim Was Made By the State, and the State Now Urges the Court to Decide This Case on the Merits 24

CONCLUSION .....

TABLE OF AUTHORITIES

Cases:

Allee v. Medrano, 416 U.S. 802 (1974).....16

Appuzzo v. Jacobs, 26 Conn. Sup. 430, 226 A.2d 110 (Superior Ct. 1966).....23

Baldwin v. Miles, 58 Conn. 496 (1890).....23

Blouin v. Dembitz, 489 F.2d 488 (2nd Cir. 1973)..... 9

California v. LaRue, 409 U.S. 109 (1972).....25

Conover v. Montemuro, 477 F.2d 1073 (3rd Cir. 1973)..... 9

Coyle v. Housing Authority, 215 Conn. 421, 198 A.2d 709 (1964.....15

Dandridge v. Williams, 397 U.S. 471 (1970)..... 4

Doe v. Norton, 365 F.Supp. 65 (D.Conn. 1973).....15, 16

Gibson v. Berryhill, 411 U.S. 564 (1973)..... 9, 20, 23

Gompers v. Bucks, Stove & Range Co., 221 U.S. 418 (1911).... 8

Goodhart v. State, 84 Conn. 60 (1911).....23

Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973), prob. Juris. noted 94 S.Ct. 1967 (No. 73-711 (1974)..... 9

Harris County Commissioners Court v. Moore, 43 L.W. 4222 (Feb. 18, 1975)..... 2, 6

Hostetter v Idlewild Liquor Corp., 377 U.S. 324 (1964) 6,7,25

Huffman v. Pursue, Ltd., C72-432 (W.D. Ohio, April 20, 1973), prob. juris. noted 945. Ct.1559 (No.73-296) (1974)..... 10

In re Clark, 65 Conn. 17 (1894)..... 23

In re Nevitt, 117 F.451 (8th Cir. 1902) (Sanborn, J.)..... 8

Jimenez v. Weinberger, 94 S.Ct. 2496 (1974)..... 4

Lewis v. Kugler, 446 F.2d 1073 (3rd Cir. 1973)..... 9

Lynch v. Household Finance Corp., 405 U.S. 538 (1972).....9

MTM, Inc. v. Baxley, 365 F.Supp. 1182 (N.D. Ala. 1973), Prob. juris noted 94 S.Ct. 1559 (No. 73-1119) (1974).....10

McCarthy v. Clancy, 110 Conn. 482 (1929).....23

Propper v. Clark, 337 U.S. 472 (1948).....26

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).....2

Roe v. Wade, 410 U.S. 113 (1973).....11

Shillitani v. United States, 384 U.S. 364 (1966).....8

Sosna v. Iowa, 95 S. Ct. 553 (1975).....25

State v. Agresta, SB App 38 (2nd Conn. Cir. 1970) (unreported).....22

State v. Anonymous, 6 Conn. Cir. 402, 275 A.2d 620 (Cir. 1971-4).....22

State v. DeAngelo, SB App. 41 (2nd Conn. Cir. 1972) (unreported).....23

State v. Muolo, 119 Conn. 323, 176A.401 (1935).....21

State v. Parks, SB App. 37 (6th Conn. Cir. 1970) (unreported).....22

State v. Townsend, 6 Conn. Cir. 73, 265 A.2d 512 (6th Cir. 1969).....22

State v. Van Camp, 6 Conn. Cir. 609, 281 A.2d 584 (Cir. Ct. App. Div. 1971).....21, 22

State ex rel. Carter v. York, SB App. 42 (D.Conn. 1970) rev'd. 430 F.2d 829 (2nd Cir. 1970).....24

Steffel v. Thompson, 415 U.S. 452 (1974).....11, 14

Szaruk v. Warden, Vol. xxxvi, No. 4 Conn. L.J.1, 12 (July 23, 1974).....21

Walkinshaw vs. O'Brien, 130 Conn. 21 122 (1943).....21

Whiteside v. State, 148 Conn. 77 (1961).....23

Williams v. Shapiro, 4 Conn. Cir. 449, 234 A.2d 376 (6th Cir. 1967).....15, 22

Wisconsin v. Constantineau, 400 U.S. 433 (1971).....3

Younger v. Harris, 401 U.S. 37 (1971).....1, 8

Statutes:

1. Conn. Gen. Stats.,§45-54.....3

2. Conn. Gen. Stats., §52-102.....13

3. Conn. Gen. Stats, §52-265a.....24

4. Conn. Gen. Stats., §52-440b.....1, 3, 7, 8, 17,22

5. Conn. Gen. Stats., §52-442.....6

6. Conn. Gen. Stats., §52-470.....23

7. Conn. Public Acts No. 74-183, 790 (1974).....23

8. Conn. Practice Book Form 243 (1963).....13

STATEMENT

The Court at oral argument granted counsel permission to file a supplementary brief addressing the relevance to this case of the principles enunciated in Younger v. Harris, 401 U.S. 37 (1971).

The issue arises because the federal complaint in this case was filed shortly after the named appellant mothers were served with rules to show cause commanding their appearance at state court proceedings under the challenged statute, Conn. Gen Stats. §52-440b. These state court proceedings have been stayed until the present in order that the federal issues may be disposed of in the federal forum. (Complete records of the state court proceedings have been appended to this brief as Appendix A).

The District Court did not address itself to either the Younger doctrine or the somewhat related question of abstention; nor were these issues raised by any of the parties below or in this Court. This Brief addresses first the abstention issue, then the Younger doctrine.

ARGUMENT

I. NO UNSETTLED QUESTION OF STATE LAW MAKES ABSTENTION APPROPRIATE.

The Pullman abstention doctrine, Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941), is an equitable doctrine counselling federal courts to decline to grant relief when state court interpretation of state law may make unnecessary a federal constitutional adjudication. The essential predicate to "Pullman abstention" is a federal claim which turns on a "state statute the meaning of which is unclear under state law." Harris County Commissioners Court v. Moore, 43 L.W. 4222, 4225 (Feb. 18, 1975). That predicate is absent here.

The suggestion was made at oral argument that in order to save the statute from constitutional attack, Connecticut courts might read it to require the appointment of a guardian ad litem for the child. Tr. Oral Arg. 32. Such a construction is neither warranted by the statute nor sufficient to save its constitutionality. Nothing on the face of the statute suggests such a requirement. No judge who has applied the statute has read it into the statute, so far as counsel is aware. And the origin of the statute casts grave doubt on the theory that such a requirement was intended by the legislature. At the time the statute was passed, jurisdiction over its enforcement was conferred on the circuit court, the only Connecticut trial

court which was not authorized by statute to appoint guardians ad litem for minors who might be affected by pending litigation. See the children's original Brief at 30. While disclosure proceedings have recently been transferred to the court of common pleas, whose judges may appoint guardians ad litem, that change is a result of the abolition of the circuit court, not a change in the legislative policy embodied in §52-440b. Where children have an interest in proceedings in probate court or juvenile court, a guardian must be appointed to protect their interests, Id., but in a proceeding in the court of common pleas the appointment of a guardian is still merely discretionary. Conn. Gen Stats §45-54.

This discriminatory failure to require representation of the interests of the child renders §52-440b unconstitutional on its face. To save the statute, the state courts would be required effectively to rewrite it. Abstention, in such circumstances, is not appropriate. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), this Court rejected the argument that abstention would be appropriate in order to permit state courts to read notice and hearing provisions into a statute which on its face appeared to contain none. So it is here.

Nor would the proposed construction render the statute constitutional. Children on welfare are deprived not only of representation accorded other illegitimate children at a disclosure hearing but of a far more valuable right: the right to have their interests control whether such a hearing will be held at all. In the case of children not on welfare, the

child's guardian or guardian ad litem determines whether or not to bring a disclosure proceeding. In the case of a child on welfare, the welfare commissioner refers every case of a mother who refuses to disclose to a private attorney, whom he then pays if and only if the mother either discloses or is brought to court. Appendix to this Supplemental Brief (hereinafter SBApp.) at 56, 80-81, 90, 124.* Even if a guardian ad litem were regularly appointed to represent the child in disclosure proceedings, the child on welfare would suffer this important and unjustifiable discrimination.

The State has not attempted to justify discrimination against illegitimate children on welfare by its interest in recouping support payments made to those children. Instead, all agree that the controlling interest in the statutory scheme ought to be the interests of the child. See, e.g., Brief of the Appellee at 1, 14, 21, 56; Tr. Oral Arg. 54-55, 57. Since the State asserts no interest in recoupment which sacrifices the best interests of the child whose mother is compelled to make disclosure, this case is analytically close to Jimenez v. Weinberger, 94 S.Ct.2496 (1974), and it may be said here as there that, "Accepting this [articulated government] view of the relevant provisions of the Act, we cannot conclude that the purpose of the [enactment] is to achieve a necessary allocation of finite resources and, to that extent, Dandridge [v. Williams, 397 U.S. 471 (19)] is distinguishable and not controlling." 94 S.Ct. at 2500.

*Three separate appendices are cited in this Brief, the single Appendix ("App."), the appendix to the children's original Brief ("Br. App.") and the appendix to this Brief ("SBApp.").

The State's position is apparently that disclosure is always in the interest of the child. Brief of the Appellee at 1, 14, 21, 56; Tr. Oral Arg. 54-55; see Brief of Children of Appellants at 29-30 n.14. But this position amounts to an irrebuttable presumption applied selectively to illegitimate children on welfare. Only children on welfare have their mothers brought into court despite strong contrary reasons. For example, the children may be developing a relationship with a stepfather or adoptive father that the proceeding would disrupt, App.41; or ~~would harm~~ disclosure that they were born of an incestuous relationship, App.45, or that their mother does not know their father's identity, Br.App. 12a-17a, 28a-30a, 35a-38a, or that their father is in prison or a mental institution; or would have no prospect of receiving support from their putative father even if his name were disclosed. In such circumstances a child not on welfare is protected from the intrusion of disclosure by the discretion of his guardian. A child on welfare, however, is subject to the State's presumption that disclosure would nevertheless serve his interest. From the perspective of the policy articulated by the State, the discrimination worked by the statute is plainly irrational.

The classification is not even justifiable on the grounds of the State's own fiscal interest. For with respect to that interest, the classifications established by the statute are both underinclusive and overinclusive. The mothers of children who have just left the welfare rolls may not be proceeded against by the welfare commissioner although the children's fathers are liable to the State for past support and lying-in

expenses, Conn. Gen. Stats. §52-442. On the other hand, the mother of a child on welfare may be proceeded against although the mother makes reliable arrangements to leave the welfare rolls and repay the Department for past support. Tr. Oral Arg. 45-46. Likewise, the mother of a child on welfare is required to identify the putative father of the child no matter how strong her showing that no support is or will be available from the father or that the State's declared interest in the well-being of the child will be thwarted by disclosure rather than advanced.

The plain constitutional flaws in this statute cannot be saved by any plausible construction. For that reason, abstention would serve no useful purpose, while it would cause serious and irreparable injury to the children.

Moreover, additional considerations counsel against abstention in this case. As the Court said very recently,

> We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in "special circumstances," see Zwickler v. Koota, 389 U.S. 241, 248 (1967), and only upon careful consideration of the facts of each case. Baggett v. Bullitt, 377 U.S. 360, 375-379 (1964), Railroad Comm'n. v. Pullman Co. supra, 312 U.S. at 500.

Harris County Comm'rs. Court v. Moore, 43 L.W. 4222, 4224 (Feb. 18, 1975). In Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964), the Court delineated some of the factors which would lead it not to order abstention.

> Unlike many cases in which abstention has been held appropriate, there was here no danger that a federal decision would work a disruption of an entire legislative scheme of regulation. We therefore accept the District Court's decision that abstention was unwarranted here, where neither party requested it and where the litigation had already been long delayed....

377 U.S. at 329 (footnote omitted). Each of these factors is present in this case. Invalidating §52-440b on the equal protection grounds asserted by the children would not disrupt any state "scheme of regulation," provision could easily be made for bringing disclosure proceedings in the case of children on welfare with the same safeguards of the childrens' best interests that are now provided for children not on welfare; and indeed the Social Security Act Amendments could provide the state with an alternative means to get information from mothers where warranted. Here also neither party has requested or apparently now wants the court to abstain. And here too litigation has been delayed; two years have elapsed since the filing of the complaint, and abstention necessarily would contemplate a full state trial and appellate proceeding and then a return to the District Court for another hearing presumably to be followed by another, distant, appeal to this Court.

II. THE PRINCIPLES ENUNCIATED IN YOUNGER V. HARRIS DO NOT MAKE DISMISSAL OF THIS ACTION APPROPRIATE.

A. The State Characterizes its Proceeding as Civil.

In Younger v. Harris, 401 U.S. 37 (1971), this Court held that a federal court should not ordinarily issue an injunction to stay a pending criminal proceeding. Because of the strong state interest in prompt enforcement of its criminal laws, a federal court exercising its equitable discretion ought ordinarily to refrain from interfering with a pending criminal case. That principle, however, does not similarly compel restraint with respect to pending civil cases. Younger v. Harris, 401 U.S.at 55n.2 (concurring opinion of Mr. Justice Stewart.) And the state proceedings pending against the mothers in this case are civil in nature.

The State has vigorously maintained, both here and in the District Court, that the proceedings are civil in character. See App. 57; Tr. Oral Arg. 37, 56. Moreover, the contempt proceeding bears important indicia of its civil character. Shillitani v. United States, 384 U.S. 364, 368 (1966); Compers v. Bucks, Stove and Range Co., 221 U.S. 418, 441-445 (1911); In re Nevitt, 117F.451, 458-459 (8th Cir. 1902) Sanborn, J.). A contempt citation under §52-440b results in incarceration not for a fixed term but rather until the prisoner complies with the underlying order by disclosure (with a statutory maximum of one year). App. 57. Thus the purpose of incarceration is purely coercive rather than punitive.

Second, the proceeding is initiated by the state welfare commissioner rather than by a state prosecutor. That is, it is initiated by the government agency that stands to benefit from disclosure, and not by the agency whose function is to vindicate the State's authority. The welfare commissioner is more closely analogous to the private party who initiates a civil contempt proceeding than to the public officer who prosecutes criminal contempt. Third, the State delegates to private attorneys the actual litigation of these contempt proceedings. This system precludes the exercise of prosecutorial discretion that is usual in criminal cases, and indicates that the agency charged with enforcement of the statute does not regard the proceedings as criminal. Fourth, the State does not provide mothers with counsel or jury trial in these proceedings, again suggesting that it regards them as civil rather than criminal. Because these state proceedings are civil rather than criminal, Younger principles should not apply to bar federal declaratory and injunctive relief. See Gibson v. Berryhill, 411 U.S. 564, 576 (1973). See also Klouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973); Lewis v. Kugler, 446 F.2d 1073 (3d Cir. 1973). But see Lynch v. Household Finance Corp., 405 U.S. 538, 561 (1972) (dissenting opinion of Mr. Justice White).

However, even if the Court regards the State proceedings as criminal or extends the Younger principle to civil cases in the cases now sub judice which raise that issue, Hamer v.

Theatres Inc. v. Cryan 365 F.Supp. 1312 (D.N.J. 1973), prob. juris noted 94 S.Ct. 1967 (No. 73-711) (1974); MTM Inc. v. Baxley, 365 F.Supp. 1182 (N.D.Ala. 1973), prob. juris. noted 94 S.Ct. 1559 (No. 73-1119) (1974). Huffman v. Pursue, Ltd., C72-432 (W.D. Ohio, April 20, 1973), prob. juris. noted 94 S.Ct. 1559 (No. 73-296) (1974), it would be inappropriate for several reasons to remit the children and their mothers in this case to illusory state remedies.

(Note to Printer: There should not be so much blank space between paragraphs).

B. The Children Were Not Parties To The State Court Enforcement Proceedings At the Time This Case Was Filed And Heard Below.

It is now established that the pendency of a state proceeding does not preclude a federal court from granting injunctive or declaratory relief against the operation of a state statute if the federal plaintiff is not a party to the pending state proceeding. Roe v. Wade, 410 U.S. 113, 125-27 (1973); Steffel v. Thompson, 415 U.S. 452 (1974). The reason for this rule is that, on one hand, relief for the federal plaintiff does not defeat or impair the State's interest in the integrity of its proceedings to the same extent as would relief for the actual party defendant in the pending state proceeding; and on the other hand, the federal plaintiff's need for relief is greater when he is not a party to the state proceeding because of the lack of an adequate opportunity to present his claims in the state forum.

In Roe, prosecutions were pending under the Texas abortion law against the plaintiff Dr. Hallford. The Court declared that the action should be dismissed as to him but not as to plaintiff Jane Roe, a pregnant woman seeking an abortion as to whom no prosecution was pending. In Steffel, the Court found dismissal improper as to a plaintiff whose claim of standing depended on having picketed with a companion although a prosecution was pending for that picketing against the companion.

In Roe and Steffel, the Court found it decisive that no proceedings were pending in state court as to which the federal plaintiff was a party. Likewise, in this case no proceedings were pending at the time this action was commenced or heard below as to which the children were a party. Under the rule of Steffel and Roe, even if the mothers are barred by Younger from seeking relief in federal court, the children are not.

The state court proceedings were commenced on December 14, 1972, by orders to show cause issued to appellant mothers at the request of appellee, the Commissioner of Welfare. The parties to those actions were the State, in the person of the Commissioner, and the mothers. Both sides were represented by counsel. The children were not parties to the state court actions in form or in fact. They were not named as parties in any pleadings; they were not represented by counsel; and no guardian ad litem was appointed by the circuit court to advocate their interests.*

FOOTNOTE

* Over a year after the entry of the District Court's judgment, shortly before the argument in this Court, undersigned counsel filed an appearance on behalf of the children of appellant mothers in the state court proceedings. This appearance did not make the children parties to the state court proceedings.

Had the children not been welfare recipients, they would have been parties to any state proceeding for disclosure of their father's identity because a proceeding may be brought in the case of a child not on welfare only by the guardian ad litem of the child. The precise discrimination the children have complained of in this case is the absence in the state court proceeding of a guardian or guardian ad litem who can

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while entering an appearance is simply a matter of handing a form to an employee of the clerk of the court, intervention requires a motion and permission of the court to participate as a party, Conn. Gen. Stats. §52-102, Conn. Practice Book Form 243 (1963). No such motion has been made on behalf of the children in the state proceedings, nor has permission to intervene been granted.

The appearance by counsel served an important informational function. It enabled him as part of his representation in federal court to be kept informed of developments in the state cases and to communicate with the state court about the status of the federal court proceedings. But it did not establish his right, or the children's, to participate fully in the state court proceedings by calling or cross-examining witnesses or raising substantive claims.

determine whether litigation is in the child's best interest and represent the child in any litigation. It is the very unconstitutional discrimination complained of which deprives the child on welfare of the party status necessary to vindicate his rights.

Moreover, even were the children to be deemed parties to the state proceedings now, they were not parties at the time the federal action was commenced, counsel was appointed for them in the federal action, the judgment was rendered below, or this Court noted probable jurisdiction. Dismissing their claims at this late date on the ground that they have now become parties to a state proceeding would be wholly inconsistent with "ordinary considerations of economy." Steffel v. Thompson, supra, 415 U.S. 452, 478 (concurring opinion of Mr. Justice White). Dismissal would also penalize the children for attempting to safeguard their stake in the federal court litigation and would undercut the District Court's scrupulous efforts to protect the interests of the children as a class. Had counsel not been appointed by the District Court to protect the interests of the class the children of appellants represent, there would have been no one to appear on behalf of the children in the state court proceeding. It would be ironic for this Court now to hold that action taken by counsel as part of his representation in the federal action, which he was able to take only by virtue of having been appointed to represent the children in the federal action, provides grounds to dismiss that action and with it the claims of the entire class of children counsel represents.

The consequences of the discriminatory denial of party status to illegitimate children on welfare are, first, that the children have no control over the course of the state court proceedings. They cannot assert their own rights on their own behalf. The most vital claims of the children may indeed not be presented at all in the state proceeding, since it is doubtful that the mothers have standing as state court defendants to assert the constitutional rights of their children in resisting disclosure under Section 52-440b. Williams v. Shapiro, 4 Conn. Cir. 449, 454-455, 234 A.2d 376 (1967) (Mother may not assert claim that denial of AFDC benefits abridged her child's constitutional rights); Coyle v. Housing Authority, 151 Conn. 421, 198 A.2d 709 (1964). Without the child participating as a party in the state court litigation, the child's rights will be unprotected and, therefore, not vindicated.

The District Court's treatment of the interests of the children is instructive. The court found that the children's interests could not properly be represented by the mothers or by the State. The court therefore appointed separate counsel for the children and for class action purposes created two subclasses:

(1) those mothers receiving AFDC assistance who refuse to comply with §52-440b; and

(2) the illegitimate children of those mothers.

365 F.Supp. 65, 69.

The Court below took these measures because it found that the children were entitled to representation and party status; in fact it deemed them "not only proper, but necessary parties." These findings of the District Court establish that proper representation of the children and vindication of their rights requires full party status and representation by counsel. The children had neither of these until the District Court appointed counsel for them in the federal action.

The Chief Justice in his separate opinion in Allee v. Medrano, 416 U.S. 802 (1974) suggests that in some situations it would be proper to "impute the state criminal prosecution of one who is not a federal plaintiff to one who is." 416 U.S. at 832 n.8. The Chief Justice argued that "any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from Younger burdens," 416 U.S. at 381, and therefore proposed a test based on the factors of "joint activity and common interest." 416 U.S. at 832 n.8. But that test is clearly not met here. For, as the district court found, the interests of the children are different from those of their mothers. Although mothers and children may both be harmed by the operation of the statute, the harms to one are distinct from the harms to the other, as the rights they assert are distinct.

Finally, even if the children of the named appellant mothers were regarded as parties, they represent a large class of children who are not parties. The federal Court action was certified as a class action as to the children, who represent the class of all illegitimate children on welfare whose mothers resist disclosure or prosecution under Section 52-440b. See 365 F.Supp. at 69. Should this action be dismissed on Younger grounds, no other infant children would, as a practical matter, be able to come into federal court as more appropriate plaintiffs. As infants, they are incapable of asserting their grievances, and the very essence of their complaint is that they are unrepresented and not parties in the state court proceedings. Because of the special inability of infant children to assert their own rights, it is especially important that the representative children be permitted to vindicate the interests of the class in this federal court action.

C. The State Court Proceeding Is Inadequate To Protect The Children From Serious, Irreparable Injury

1. The State Proceeding Itself Operates To Inflict Irreparable Injury On The Children

Even if the children were represented in the state proceedings, they would be unable to obtain relief as complete as that available in federal court for two reasons. First, the very nature of the state proceeding, by itself, injures the child. Second, because the state proceedings may only be instituted against the mothers of children not on welfare if there is a determination that doing so is in the best interests of the child, and because no such determination is made for welfare children, forcing children on welfare to go through these state proceedings to vindicate their rights itself discriminates against them.

The state proceeding jeopardizes the child's relationship with his mother because it subjects her to anxiety and humiliation on the child's account for which she may at least on an emotional level hold the child responsible. Her emotions will affect her child and diminish his own feelings of self-worth and trust. See App. 65, 128. The demeaning nature of the proceeding is evident from transcripts, reproduced in the Appendix to the children's original Brief, which contain inquiries such as the following, at Br. App. 36a:

THE COURT: You didn't know the identity of the father?

THE WITNESS (MOTHER): No, I don't know who the father is.

THE COURT: Why?

THE WITNESS: Because I was going out with more than one Guy at the time.

THE COURT: You were what?

THE WITNESS: I was going out with more than one guy at the time.

THE COURT: You were going out with more than one guy at the time. Well that indicates then that you were having relations with a number of persons.

THE WITNESS: Yes.

THE COURT: Well, the name to attach to that is that you were promiscuous. Do you know what that means?

THE WITNESS: No.

As affidavits and depositions below demonstrated, the process itself often exacerbates strain between the parents as well, for which the young child will often blame himself because he feels that "he is in fact the cause of tension between them." App. 128. See App. 64-65.

The child will suffer devastating irreparable injury if his mother is incarcerated while attempting to vindicate her rights in the state courts. In that event, the very young child of an incarcerated mother is likely to suffer grave psychological harm. App. 65-66. The record, and other medical studies, show that the sense of loss a child feels when separated from his mother at an early age may stay with the child for the rest of his life. Id.; see Brief of Amici Curiae at 16-21. If a mother is relegated to State court to protect her rights, and is incarcerated pending appeal * she is faced with a Hobson's

* As she probably will be, see p. 24, infra.

choice: whether she chooses to remain in prison, or to dissolve the putative father's name, which she earlier decided was against the best interests of the child, the child will be harmed.

These risks of damage to the well-being of an infant or young child should be considered the type of "irreparable injury" which permits an exception to the Younger rule, see Gibson v. Berryhill, 411 U.S. 564 (1973), particularly here where that injury is a direct consequence of the discrimination against children on welfare which permits actions to be instituted and prosecuted under Section 52-440b without regard to their well-being. Remitting these children to the state court proceedings exposes them to these injuries. Had they not been receiving welfare there would have been no such exposure because there would have been no proceeding unless their guardian or guardian ad litem determined that a proceeding was in the child's interest. For this Court to require dismissal under Younger would be to increase the discriminatory burden upon the children by exposing them to yet another proceeding to which they would not have been exposed had they not been on welfare. Younger does not require such a result.

2. The State Court Proceeding Does Not Provide An Adequate Opportunity To Raise And Have Timely Decided The Federal Issues Involved

In Gibson v. Berryhill, 411 U.S. 564 (1973) this Court held that the principles enunciated in Younger v. Harris and

its proposition did not preclude federal courts from acting where the District Court had found that the state remedy was defective. In that case the state administrative tribunal before which a proceeding was pending was found by the court to be biased against the federal plaintiffs. This defect was not cured by the availability of de novo judicial review because the District Court had found that an adverse administrative finding would irreparably injure the federal plaintiffs.

Gibson requires that this action not be dismissed, for two reasons. First, the contempt proceeding now pending against the appellant mothers will not provide a competent forum for adjudication of the federal claims of the mothers or children. Second, mothers can secure appellate review of a contempt finding only at a cost of irreparable injury to themselves and, especially, their children.

The Court of Common Pleas, the tribunal before which the state proceedings are now pending, is very likely to decline to adjudicate the claim that the statute is facially unconstitutional. It is Connecticut doctrine that legislative enactments ordinarily should be declared unconstitutional only by courts of plenary jurisdiction and not by inferior courts, of which the court of common pleas is one.* This doctrine was first enunciated by the Connecticut Supreme Court in State v. Muolo, 119 Conn. 321 (1935). The Court there said, criticizing an inferior court for declaring a state statute

*State v. Van Camp, 6 Conn. Cir. 609, 616, 281 A.2d 584 (Cir. Ct. App. Div. 1971); cf. Szarsek v. Warden, Vol. XXXVI, No. 4 Conn. L.J. 1, 12 (July 23, 1974); Walkinshaw v. O'Brien, 130 Conn. 122 (1943).

unconstitutional,

> In the absence of constitutional or statutory prohibition, any court has power to pass on the constitutionality of a statute... but a proper regard for the great coordinate branch of our government, the legislative, and for the preservation of the respect of our citizens, who are apt to look askance upon a decision of a court...limited in its jurisdiction... holding invalid the considered legislative judgment, dictates that such a court should take such action only upon the clearest ground or where the rights of litigants make it imperative that it should do so. Otherwise it is better...to leave the decision to our higher courts, to which the matter may be brought by appeal or otherwise. 119 Conn. at 326

The Muolo doctrine has been applied by lower Connecticut courts to short-circuit their review of challenged legislative enactments, either by refusing entirely to address the merits of a constitutional claim, or by rejecting the claim on the ground that its merit is not entirely free from doubt. See, e.g., State v. Van Camp, 6 Conn. Cir. 609, 281 A.2d 584 (Cir. Ct. App. Div. 1971); State v. Townsend, 6 Conn. Cir. 71, 265 A.2d 512 (6th Cir. 1969); Williams v. Shapiro, 4 Conn. Cir. 449, 452, 234 A.2d 376 (6th Cir. 1967); State v. Anonymous, 6 Conn. Cir. 402, 404-5, 275 A.2d 620 (Cir. 1971-4); State v. De Angelo, SBApp. 41a (unreported); State v. Parks, SBApp.37a (unreported); State v. Agresta, SBApp. 38a (unreported). Either approach in the state proceedings against appellant mothers would delay, or preclude, a complete adjudication of the constitutional claims the mothers and children have presented in their federal court action.

The State has in fact urged the state tribunal in the proceedings now pending against the named appellants to refuse to consider constitutional objections to §52-440b, on the ground that Muolo requires such objections to be deferred for consideration on appeal. The State's position in the proceedings against appellant mothers is that the trial court "should not

rule on the constitutionality of statutes." SBApp. 29a. If the federal plaintiffs are remitted to their state remedies, it is unlikely that the trial court will provide the "competent state tribunal" in which appellant mothers of children will have "the opportunity [contemplated in Younger] to raise and have timely decided...the federal issues involved," Gibson v. Berryhill, supra, 411 U.S. at 577.

The second part of the Gibson analysis turned on the adequacy of appellate review to undo the damage done by an adverse adjudication rendered by the incompetent tribunal. Here a contempt finding would predictably result either in disclosure, which might work irreparable harm, or in incarceration of the mothers for a substantial period of time, which would work a deprivation of maternal care on the children that appellate review cannot undo. Direct review of a contempt finding in a Section 52-470b proceeding is available if at all only by Writ of Error. Whiteside v. State, 148 Conn. 77 (1961); Goodhart v. State, 84 Conn. 60 (1911); Baldwin v. Miles, 58 Conn. 496 (1890).* There is

* It is unclear that even a Writ of Error is now available to mothers held in contempt. The Connecticut Legislature as part of a court reform act has recently abolished the statutory basis for a Writ of Error from the court of common pleas. Conn. Public Acts No. 74-183, 595. If the Writ is unavailable, the sole method of review is now habeas corpus, see, e.g., McCarthy v. Clancy, 110 Conn. 482 (1929); In re Clark, 65 Conn. 17 (1894), as to which bail is not required, the actual imprisonment of the mother is a necessary predicate, Appuzzo v. Jarvis, 26 Conn. Sup. 430, 226 A.2d 116 (1965), and review by the Connecticut Supreme Court is discretionary, Conn. Gen. Stats. 52-470.

no assurance whatever that a trial court would permit a mother bail pending appellate review; to the contrary, Connecticut's view that 52-440b is civil and coercive in nature support that no bail may be granted. See, State ex rel Carter v. York, SBApp 42a (unreported) (D. Conn. 1970), rev'd/4/10 F.2d 1179 as modified (2d Cir. 1970). While there are provisions for expedited appeal in Connecticut, Conn. Gen. Stats. 52-265a, expedition is at the discretion of the Supreme Court, and is by no means always granted. It was denied, for example, in the Carter case, supra, which involved an application for review of a finding of civil contempt for refusal to testify. See SBApp. . Even if review is expedited, children may still be deprived of the presence and care of their mothers and sole guardians for weeks or months while their mothers are incarcerated pending appellate review. The harm Sharon Roe's two and one-half year old daughter would suffer from such a separation is surely at least as grave as the harm the optometrists in Gibson incurred by temporary suspension of their licenses and attendant publicity, 411 U.S. at 495-496.

Like the federal plaintiffs in Gibson, in short, the mothers and children here have a remedy in state proceedings which is available only at the cost of incurring serious irreparable injury because of the incompetency of the original tribunal to give them the relief to which they are entitled.

D. No Younger Claim Was Made By The State, And The State Now Urges The Court To Decide This Case On The Merits

The State did not urge dismissal under Younger below,

but pressed for an adjudication on the merits. In this Court the Younger issue was not raised by the State. Counsel is now informed that the State's position is that this Court should not direct dismissal under Younger or Pullman abstention, but should reach and resolve the substantive constitutional issues.

The state judiciary has likewise thought it appropriate to await a federal determination of the federal claims before requiring disclosure. Although no injunction has ever issued against the state proceedings; they have been stayed during the entire pendency of the federal action, as the state court files reveal. SBApp. 3a, 12a-13a. The most recent state court order, entered with the consent of the State, is that these cases be marked "off with the privilege of recall -- awaiting the U.S. Supreme Court decision in Roe vs. Norton." SBApp. 3a, 13a (This notation means that while a new action need not be filed, the case has been placed in a dormant status until reactivated at the request of one of the parties.)

This Court has previously found the wishes of the parties that the merits be reached sufficient reason not to address Younger issues. Sosna v. Iowa, 95 S.Ct. 553, 556 n. 3, (1975). This policy is required by Younger, which "rests heavily on federal deference to state administration of its own statutes...Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964)." California v. LaRue, 409 U.S. 109, 124-25 n. 2 (1972) (dissenting opinion of Mr. Justice Marshall). Rather than being an abrasive disruption of state proceedings, a federal action may serve important state interests by providing a relatively speedy, authoritative

ruling on the legitimacy of a state program challenged as inconsistent with federal law. While state courts are bound by the supremacy clause to interpret and apply federal law relevant to issues before them, federal courts may appropriately be recognized as expert in federal law as state courts are expert in state law. See, e.g., Propper v. Clark, 337 U.S. 472 (1948). Additionally, a State may have, and indeed does have here, an interest in a comprehensive ruling available in a class action proceeding which would not be available in a state court proceeding under §52-440b. Therefore when a State seeks an adjudication on the merits of a federal claim in federal court, the principle point of Younger is inapplicable and hence without force.

CONCLUSION

The related doctrines of Pullman abstention and Younger restraint were designed to further interests that are conspicuously absent from this case. We urge the Court to decide the merits.

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March 7, 1975

CERTIFICATION

This is to certify that a copy of the foregoing Supplemental Brief was mailed First Class Mail, Postage Prepaid, by depositing same in a United States Mail Box on March 7, 1975, to each of the following:

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